In The

Supreme Court of Virginia

RECORD NO. 121534

PKO VENTURES, LLC,

Appellant,

v.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Appellee.

REPLY BRIEF OF APPELLANT

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In response to Assignment 1, the Authority maintains that by filing suit just before the acquisition deadline in 2010, it obtained a protected right to acquire this property, without any time limitation. In doing so, it makes the same mistake that the trial court made. It argues that the passing of the deadline could have no effect on pending litigation, because the deadline had not "taken effect" before this suit was filed.

This error may be addressed simply: The acquisition deadline had been in effect since 2007, long before the Authority filed this belated proceeding. The 2007 legislature immediately barred most *Kelo*-style condemnations, but gave housing authorities three years to finish acquiring properties under previously approved redevelopment plans. The Authority chose to delay the start of this litigation to a hopelessly late date, knowing that it could never complete the acquisition in the 5½ weeks before the deadline.

The Authority repeatedly contends that the adoption of the redevelopment plan in 1998 gave it a legally protected right to acquire this property, evidently in perpetuity. Brief of

appellee at 8, 11, 12. The authority for this proposition is identified as Code §§36-49(1) (*sic*; probably 36-49(a)(1)) and -51. Brief of appellee at 8.

But these statutes do not create vested rights for authorities; they merely specify the prerequisites to carrying out redevelopment plans. A condemnor's right in and to the property vests only when it pays just compensation after a trial. Code §25.1-237. Until this suit was filed, the legislature could enact laws and this Court could promulgate rule changes without impairing any right belonging to the Authority.

For example, in 2007 the General Assembly amended the eminent-domain statutes to provide for trial by condemnation jurors. 2007 Va. Acts. ch. 450. In 2003, this Court amended Rule 1:12 to provide for service of papers by electronic mail. The Authority could never be heard to complain that it was immune from these changes merely because it had adopted its redevelopment plan in 1998.

The legislature's enactment of the July 2010 deadline served as a "three-year warning" to permit authorities to complete their acquisitions before it was too late. This statute was never intended (as Clause 4 was, in contrast) to allow them three years to make up their minds whether to initiate acquisitions.

* * *

In response to the landowner's contention that the Authority was a biased decisionmaker on the existence of blight, the Authority contends that the money it received was merely reimbursement for administrative costs. Brief of appellee at 28. For this contention, it cites A. 263, a page of the cooperation agreement that calls for the 4% fee. But there is no evidence in the record of the Authority's ever incurring such expenses, or quantifying them. This argument is supported by no more than the veneer of the Authority's own label for the fees.

The proper administration of justice requires that an adjudication such as the blight finding must be free from any

improper influence. "The eminent domain statutes, designed to implement constitutional mandates, 'must be administered in a manner which promotes confidence in the integrity of the process.'" *City of Virginia Beach v. Giant Sq. Shopping Ctr*., 255 Va. 467, 470 (1998), quoting *Comm'r v. Dennison*, 231 Va. 239, 242 (1986). In other words, justice must not only be done, it must also appear to be done.

The Authority sees nothing wrong with its receipt of over $400,000 as a direct result of its having found blight in precisely the pre-mapped area that the university wanted to acquire for private development. But a financial incentive like this, contingent upon a particular finding of blight, is unlikely to be ignored by any unbiased observer. The Authority had over 400,000 reasons to make the finding that it did.

* * *

The Authority incorrectly asserts that its determination of blight is a legislative act. Brief of appellee at 17. For this premise, it cites *Rudder v. Wise County Redev. & Hous. Auth*., 219 Va. 592, 595 (1978). But this Court never made

such a statement in *Rudder*. Instead, it noted that the finding of blight "was presumptively correct but subject to review by the trial court." *Id*. at 595. The *Rudder* decision provides that such review is to determine, by clear and convincing evidence, whether "the finding was arbitrary and unwarranted." *Id*.

Legislative decisions, in contrast, are reviewed under the "fairly debatable" standard. *Gregory v. Chesterfield County*, 257 Va. 530, 537 (1999). If the Authority wished to contend that its finding of blight was entitled to this level of deference, it was obliged to say so in identifying the standard of review for this issue. Rule 5:28(d). *Compare* brief of appellee at 16 (standard of review is de novo).

In any event, the landowner's main objection here goes to the structural error of a biased decisionmaker. The focus in such instances is on the process, not on the outcome. *Morrisette v. Warden*, 270 Va. 188, 192 (2005) (denial of impartial judge is structural error); *Roberts v. CSX Transp*.,

Inc., 279 Va. 111, 118 (2010) (stockholder in corporation may not sit on jury despite his insistence of impartiality).

The landowner was entitled to an unbiased decisionmaker in the quasi-judicial proceeding to determine if blight existed, just as much as it was entitled to an impartial judge and a panel of veniremen who stood indifferent to the cause at trial.

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CERTIFICATE

I hereby certify that on this 4th day of April, 2013, pursuant to Rule 5:26, fifteen paper copies of the foregoing Reply Brief of Appellant, along with one copy on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. Three paper copies of the Brief, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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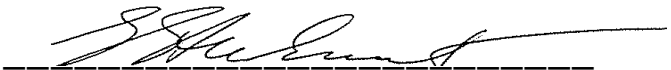

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